Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, 76-1685

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, CHANNEL TWO TELEVISION COMPANY, *et al.*, NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, ILLINOIS BROADCASTING CO., *et al.*, THE POST COMPANY, *et al.*,

Petitioners

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC.

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent American Broadcasting Companies, Inc.

Of Counsel:

MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C.

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

INDEX

	Page
Statement of the Case	2
Summary of Argument	2
Argument	3
Conclusion	6

CITATIONS

Cases:

Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971)	5
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940)	5
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943)	5

Statute:

5 U.S.C. § 706(2) (A)	5

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1521

CHANNEL TWO TELEVISION COMPANY, *et al.*,
Petitioners
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioners
v.
FEDERAL COMMUNICATIONS COMMISSION

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Petitioner
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1624

ILLINOIS BROADCASTING CO., *et al.*,
Petitioners
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1685

THE POST COMPANY, *et al.*,
Petitioners
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC.

STATEMENT OF THE CASE

American Broadcasting Companies, Inc. (ABC) considers the Statement contained in the Brief of Petitioner Federal Communications Commission (Commission) to be an accurate description of the underlying proceedings.

SUMMARY OF ARGUMENT

The most important issue before this Court is the Court of Appeals requirement that the Commission mandate

divestiture in order to separate co-located newspaper/broadcast crossownerships. ABC, which operates a national television network and five owned television stations as well as radio networks and owned radio stations, considers the subject Court of Appeals action to be unjustified judicial intrusion into a function entrusted by law to the Commission. Moreover, ABC's own broadcast experience, which is comprehensive, supports the general conclusion that newspaper/broadcast crossownerships are not abusive or contrary to the public interest.

ARGUMENT

A. Introduction

ABC, although not a newspaper publisher, has had considerable experience with co-located daily newspapers and broadcast stations. For example, a number of television stations affiliated with the ABC Television Network are owned by companies which publish a daily newspaper in the same community, and many ABC affiliates which are not newspaper co-owned compete with NBC and CBS affiliates which are newspaper owned. In addition, ABC owned television stations in New York, Chicago, San Francisco and Detroit all compete with television stations in those communities which are under common ownership with a daily newspaper. Similar conditions exist with respect to ABC's radio network operations and owned stations.

ABC's interest in this proceeding is with the preservation of a sound television and radio industry structure—consistent with legitimate public interest concerns. Because of its somewhat detached perspective on the issues before the Court, ABC is hopeful that these views will be of particular assistance to the Court.

B. The Court of Appeals Usurped Commission Prerogative In Requiring Divestiture

From ABC's perspective, the most important issue here involved is whether the Commission abused its discretion in not requiring, except in certain extreme situations, the breakup of co-located newspaper/broadcast crossownerships. The Court of Appeals ruled that the Commission must require such breakup unless a waiver of the requirement is justified. In effect, the Court of Appeals reversed the Commission's presumption against forced divestiture.

The Commission concluded that the future structure of the broadcast industry would be enhanced if no *new* newspaper/broadcast crossownerships were created and if existing crossownerships were broken up when the newspaper or broadcast station might be sold to a new owner. Its judgment was based largely upon theoretical concerns with diversification, as there was little evidence that newspaper/broadcast crossownerships have resulted in competitive abuses or deleterious broadcast service; indeed, the record showed that newspaper owners have run some of the best broadcast stations from the standpoint of public service. At the same time, the Commission concluded that the draconian remedy of forced divestiture, with unpredictable and possibly undesirable consequences, should not be adopted.

While ABC does not agree with the Commission that new newspaper/broadcast crossownerships should be prohibited, that is not the issue with which ABC is here concerned. In ABC's judgment, the critical issue is who is to decide communications policy questions of this sort—the Commission or a reviewing court. With respect to divestiture, we think the answer is very clear; the function at issue should be left to the administrative agency.

The Commission's judgment in this matter, after a full and comprehensive rulemaking proceeding in which a wide range of viewpoints was heard, is precisely the kind of function which our system entrusts to the administrative agency. Judicial review is limited and narrow. It is not the function of the reviewing court to substitute its judgment for that of the agency. 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Yet that is precisely what the lower court did in this case.

The Court of Appeals reasoned that the Commission's desire for an improved industry structure was inconsistent with not requiring forced divestiture. Such reasoning is overly simplistic. The task before the agency was to balance various public policy considerations and fashion a remedy appropriate in all of the circumstances. The so-called inconsistency is nothing more than a recognition that the public interest benefits associated with improved industry structure weighed more heavily in the balancing process when forced divestiture, with its attendant detriments, was not involved.

C. ABC's Experience Confirms That Newspaper/Broadcast Crossownerships Have Not Been Abusive

ABC's experience confirms that as a general matter common ownership of a co-located newspaper and broadcast station is not injurious to the public interest. For example, ABC is aware of those of its television network affiliates which are under common ownership with a newspaper, and it is aware of the affiliates of the other two national television networks with which its affiliates compete which are under such common ownership. ABC's general experience has been that abuses of position are not present.

ABC's experience on the television network level is also confirmed by its experience in the operation of five television stations in major markets, which in four instances compete with stations that are newspaper-owned. ABC owned television stations are not at a competitive disadvantage in competing with television stations under common ownership with a co-located newspaper.

Similarly, ABC's experience in operating radio network services plus owned radio stations in seven communities supports the judgment that co-located and commonly owned newspapers and radio stations in general are operated in the public interest and not in an abusive fashion.

CONCLUSION

ABC respectfully urges this Court to reverse the Court of Appeals decision insofar as it failed to affirm the Commission's decision against wholesale forced divestiture of co-located newspaper/broadcast crossownerships.

Respectfully submitted,

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent
American Broadcasting Companies, Inc.

Of Counsel:

MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C.

November 17, 1977